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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re the Marriage of DAVID M. and JENNIFER LUPTON.	
DAVID M. LUPTON, Appellant, v. JENNIFER BOYD, Respondent.	C041461 (Super. Ct. No. FL016717)

David Lupton (father) appeals in propria persona from an order that increased his required child support payments to Jennifer Boyd (mother). Father also purports to appeal from a subsequent order denying his motion for reconsideration, which is not appealable. We shall dismiss the appeal from the order denying reconsideration and affirm the order modifying child support.

FACTUAL AND PROCEDURAL BACKGROUND

Father and mother married in March 1994 and had three children. They separated in November 1997. Their divorce became final in December 1998. They received joint legal and physical custody of the children.

The 1999 order

In October 1999, the trial court (Judge Rutherford) ruled on a motion by mother to modify child support, among other things. The court found that father's gross income was $3,118 per month, while mother's gross income from part-time work at Chico Sports Club at $6.03 to $6.50 per hour was $724.34 per month. The court noted father's position that mother ought to resume full-time work comparable to her previous job as a bookkeeper earning $8 to $9 per hour, or that the court should impute full-time minimum-wage income to her; however, the court declined to make any such order because mother's current employment provided her childcare benefits.

The court set father's child support payments at $990 per month. The court ordered father to report all bonuses for the prior year to mother and pay her 32 percent of any such sums in addition for child support. However, the court also stated: "The Court does not believe Father's 'side jobs' are of such significance as to require a similar order, nor could it be enforced."[1]

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[1] The record does not show what information father gave the court about his "side jobs" at this time.

The court entered its ruling as a "[s]upplemental [j]udgment" on June 12, 2000.[2]

Mother's 2001 motion

In November 2001, mother filed a motion requesting various forms of relief, including an order that father pay her the required share of any bonuses received and provide an accounting for them.

Responding, father requested an order for guideline support based on mother's "earning potential." He claimed a gross income of $3,143 per month from all sources and a net income of $2,333 per month. His only declared source of income was salary from full-time employment. He claimed (supported by a letter from his employer) to have received no bonuses in 2001.

Father declared that mother had "willfully" quit her bookkeeping job at Chico Sports Club in March 2001, taken temporary work until August, then claimed she was unemployed but starting a home day care business. According to father, because

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[2] The record also contains "[f]indings and [o]rder after [h]earing" filed May 15, 2000, by Judge Howell, which assesses father's child support obligation at $858 per month. The order finds that father's gross monthly income is $3,118 and mother's gross monthly income is $1,225. However, Judge Rutherford's "[s]upplemental [j]udgment," entered the following month, does not refer to this order or any hearing that preceded it. The hearing which preceded Judge Howell's order is not in the record.

mother had voluntarily reduced her income from $1,271 per month to $600 per month, she should be subjected to a *Philbin* order.[3]

Mother requested a hearing on the motion. She also requested discovery from father about all sources of income, including "side jobs."

Father's banking records revealed an average deposit of $3,622 per month over the period January 2001 to March 2002--significantly higher than his declared gross income of $3,143 per month, let alone his declared net income of $2,333 per month.

The hearing

Judge McNelis held a hearing on the motion on March 26, 2002. Both spouses testified.

Mother testified that she was studying early childhood education full-time at Butte College to qualify as a preschool teacher. She would have completed enough units by the end of the spring semester to be employable at $8 per hour, but she planned to continue into the fall semester to complete the program. Once she had done so, she would be able to get a full-time job in the field with medical and dental benefits.

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[3] In *Philbin v. Philbin* (1971) 19 Cal.App.3d 115, 121, the court held that a spouse who deliberately avoids gainful employment or intentionally depresses his or her income to evade support obligations may be subjected to an order based on ability to earn, rather than actual income. Under the subsequently enacted Family Code section 4058, however, the trial court may attribute income to a spouse for child support purposes without any finding of bad faith conduct. (See part II of the Discussion.)

In the summer of 2001 mother worked 25 to 30 hours per week for two months at Lime Saddle Marina, making a little over $8 per hour. When that position ended, she opened a day care center in her home, but then decided the house was too small for it and she wanted instead to become a preschool teacher. She had never obtained a license to provide day care and did not plan to do so.

She currently had her four-year-old at home. She had provided paid day care for another child, but stopped doing so in January. She now provided day care for another child, being paid $500 per month.[4]

Father testified that he did "side jobs" as a handyman. His side work was sporadic, with jobs in some months and not others. He deposited his side job income into the same bank account as his full-time paycheck. He had not shown side job income on his tax forms or his income and expense declaration. He had no records of that income.

Asked if his bank records showed average deposits of $2,884 per month for the period from 2000 to 2001 and $3,667 per month for the period from 2001 to 2002, father did not disagree; however, he asserted that his deposits did not consist solely of earned income. He also asserted that his side job income should not be used to increase his support obligation because "I have a

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[4] On cross-examination mother testified that the child she now cared for was her boyfriend's daughter. She lived in his home and paid him $600 per month in rent.

standing order by Judge Rutherford on the original judgment . . . that states that side jobs are insignificant."[5]

Judge McNelis's rulings

Judge McNelis made the following oral ruling as to child support and imputed income for both spouses:

"When you [father] make reference to what Judge Rutherford did back in 1999, I can read that; that's not all binding. And I don't know what the situation . . . was in '99, but the unreported income or the unreported money going into your checking account . . . is not insignificant. It's not inconsequential, and it's not something that doesn't go to child support.

"Now, the fact that you have expenses built in there, but that you've apparently chosen not to declare that income for Federal income tax purposes--I mean, I can't let you play games with the IRS and then turn around and play games with the Court, too. If there was money going into that account, I've got to consider it for purposes of supporting the children. And if you haven't kept track of the expenses . . . for whatever reason, I can't help you with that. I've got to consider what I've got in front of me.

"So to the extent that you thought Judge Rutherford's order was a permanent, all-encompassing, forever order [that] any side jobs that you chose to do in the future would be

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[5] Judge McNelis reviewed and took judicial notice of the relevant part of Judge Rutherford's ruling.

inconsequential, that's not what it says, and that's not the way I interpret it, so I have to use that income for purposes of setting child support.

"I am going to impute minimum wage earning capacity to your former wife. And if we're in court in six months or eight months, I may impute a higher figure to her if she's earning more, but at this point in time I'm going to base it upon the $118 [*sic;* $1,118]. [¶] . . . [¶]

"A lot of . . . your being in court today is a result of your misunderstanding, I think, of Judge Rutherford's order. And I think you've gone to a lot of aggravation and you've put [mother's counsel] to a lot of work, and we've had a hearing because you didn't report and you didn't answer his questions in the I & E [Income and Expense Declaration]--didn't fill out your I & E honestly.

"Now, I think it was because you misunderstood the effect of Judge Rutherford's order, so in a way I can understand it, but it was your misunderstanding that caused us to be here today, not mine, sir."

On April 17, 2002, Judge McNelis made a written order after hearing that provides in part as follows:

1. Father shall pay mother $1,225 per month in child support.

2. Father's net spendable income from his side jobs and his regular employment is $3,250 per month.[6]

3. The court imputes a minimum wage income to mother in the amount of $1,118 per month.

4. Mother has the ability to earn minimum wage.

5. Father has significant tax-free income from side jobs which he has not reported to the court.

Father's motion to *modify* the order

On April 9, 2002, father filed a purported motion to "[m]odify existing order [h]eard 3-26-02."[7] Father requested child support be "modified to guideline based on the new information contained herein." He asserted the order calculated his income improperly because he would have to work 50 or more hours per week to earn the income ascribed to him. As to mother's income, father asserted Judge McNelis had calculated too low an amount for minimum wage, but that in any event he should have imputed income to mother at the rate of $8 per hour, the amount she formerly earned as a full-time bookkeeper, because she had voluntarily quit the work force.

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[6] Judge McNelis apparently derived this figure by roughly splitting the difference between father's average deposits for 2000 to 2001 and 2001 to 2002, as mother's counsel suggested.

[7] As Judge McNelis had not yet entered a written order after hearing, this motion was premature. However, it does not appear from the record that mother raised this point. In any event, Judge McNelis ruled on the motion without mentioning its timing.

Mother filed a responsive declaration opposing the motion. She asserted it was really a motion for reconsideration under Code of Civil Procedure section 1008, and improper as such because it did not show any change of circumstances and did not explain why husband could not have presented any newly alleged facts at the prior hearing.

Judge McNelis heard the motion on May 14, 2002, and denied it by minute order. (The transcript of the hearing, if any, is not in the record.) Judge McNelis entered a written order after hearing to the same effect on June 4, 2002.

Father now appeals from both the order after hearing dated April 17, 2002, and that dated June 4, 2002.

DISCUSSION

I

We must decide whether the order after hearing of June 4, 2002 is appealable. We conclude it is not.

Father's statement of appealability in his opening brief merely asserts, without supporting reasoning or authority, that the order is appealable. Bare assertion does not satisfy rule 14(a)(2)(B) of the California Rules of Court, which requires that an appellant's opening brief *explain* why the judgment or order at issue is appealable. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 556-557.) Father's self-representation does not excuse noncompliance with the rules on appeal, because an appellant in propria persona is held to the standard of an attorney. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

Mother asserts that though father's motion purported to seek modification of the trial court's order on child support, it was actually a motion for reconsideration of that order (Code Civ. Proc., § 1008), and the denial of a motion for reconsideration is not appealable. (*Crotty v. Trader* (1996) 50 Cal.App.4th 765, 769; see *In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 81 [noting most of the recent cases so hold].) Mother also asserts that even if an order denying a motion for reconsideration might be appealable where the underlying order was appealable and the motion raised new or different facts (see *In re Marriage of Burgard, supra*, 72 Cal.App.4th at p. 81), father's motion did not raise such facts.

Father's reply brief asserts that his motion was truly a motion to modify the court's order, not a motion to reconsider. He also claims: "The courts have long held that [m]otions to [m]odify are appealable." However, he fails to cite any decision so holding. Legal propositions asserted without authority are waived. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794.)

Because father has failed to comply with rule 14(a)(2)(B) of the California Rules of Court, he has not met his burden to show that the order in question is appealable. In any event, we agree with mother that father's motion was actually a motion for reconsideration, the denial of which is not appealable.

A motion to modify a child support order requires a showing of material change in circumstances. (Fam. Code, § 3651; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 298; further

undesignated statutory references are to the Family Code.) Father did not make such a showing. He merely argued that the court misapplied the law to the facts before it when it made the order.[8] Thus he sought not modification but reconsideration of the order. We agree with the weight of authority holding that orders denying motions to reconsider are nonappealable. (See *In re Marriage of Burgard, supra,* 72 Cal.App.4th 74, 81, and cases cited.)

Because the order denying father's motion to reconsider was not appealable, we shall dismiss the appeal as to that order.

II

As to the order of April 17, 2002, father contends Judge McNelis erred by (1) including his side job income in his net disposable income for support purposes, and (2) imputing only minimum wage income to mother. In consequence, according to father, the order does not conform to guideline standards for child support. We disagree.

The guideline support formula for child support includes the parties' total net monthly disposable incomes as a component. (§ 4055, subd. (b)(1)(E).) The parties' net disposable incomes consist of their annual gross incomes, minus statutory deductions not relevant to this appeal. (§ 4059.)

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[8] In his reply brief father asserts that there was a material change in *his* circumstances around the time of the original hearing: his full-time pay increased from $18.13 to $20.63 per hour, a raise of $433 per month. He fails to explain how this change in circumstances justified the relief he sought in his motion.

The annual gross income of each parent means "income from whatever source derived," other than child support payments and need-based public assistance programs. (§ 4058, subds. (a), (c).) The trial court "may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (§ 4058, subd. (b).) "[F]or purposes of determining support, 'earning capacity' represents the income the spouse is reasonably capable of earning based upon the spouse's age, health, education, marketable skills, employment history, and the availability of employment opportunities." (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234.)

An order modifying child support will be upheld on appeal unless the trial court abused its discretion. Because child support is highly regulated by the law, however, the court possesses only the discretion provided by statute or rule. (*In re Marriage of Butler & Gill* (1997) 53 Cal.App.4th 462, 465.)

Father's income

Father contends the trial court abused its discretion by including his side job income in his total net monthly disposable income because this will require him to work the "extraordinary" and "onerous" schedule of 50-plus hours per week. (See *In re Marriage of Simpson, supra,* 4 Cal.4th 225, 234-235; *In re Marriage of Serna* (2000) 85 Cal.App.4th 482, 486.) However, he fails to cite any evidence that supports this claim. Indeed, he could not possibly do so. By his own admission, he has never documented his hours or rates for side

jobs. Thus the record does not show he must work any particular number of hours per week to earn the income the trial court ascribed to him.[9]

An appellate contention which depends on alleged facts unsupported by record citation may be disregarded. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; Cal. Rules of Court, rule 14(a)(1)(C).) Because father has not shown with record citation that he would have to work 50-plus hours per week to earn the income ascribed to him, we need not consider whether such a schedule would be "extraordinary" or "onerous."

Father also asserts that to require him to work any hours beyond his full-time schedule to meet support obligations amounts to imposing mandatory overtime in violation of Labor Code sections 510, subdivision (a), and 552.[10] This point fails.

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[9] Father tries to create evidence in support of his claim by extrapolating arithmetically from figures in the record. This is improper. The time for father to make an evidentiary showing on this point was at the hearing before Judge McNelis, and the manner in which to make it was by presenting records documenting hours worked and rates charged for side jobs. Father's calculations in his appellate briefs are not evidence. Therefore, we will not address them.

In father's reply brief he asserts that there are four volumes of material on this case in the superior court's files. But we can consider only what has been properly put before us. Father, as the appellant, had the burden of furnishing this court the evidence he wished us to consider. (Cal. Rules of Court, rules 4(a)(1), 5(a)(1).) Anything not so furnished to us is immaterial.

[10] Labor Code section 510, subdivision (a), provides that eight hours of labor constitutes a day's work and sets out rules on how "an employer" must compensate "an employee" for overtime.

Those provisions apply on their face only to an employee's full-time job for his full-time employer, not to secondary jobs worked for part-time employers, and father cites no authority holding otherwise. Father also cites no authority holding that those provisions have any bearing on child support orders under the Family Code.

In short, father has not shown that the trial court abused its discretion by imputing a net monthly income of $3,250 to him.

Mother's income

Father contends the trial court abused its discretion by imputing only minimum wage income to mother because she had the capacity to earn more but chose to withdraw from the work force. He also contends the trial court did not make adequate findings to justify its order on this point. We are not persuaded.

In making child support orders, the family court has the discretion to impute income to a supported spouse based on earning capacity. The court may do so, however, only if it is in the best interest of the children. (§ 4058, subd. (b); *In re Marriage of Cheriton, supra*, 92 Cal.App.4th 269, 301.)[11]

Labor Code section 552 provides that an employer must give his employees at least one day off per week.

[11] The court in *In re Marriage of Cheriton, supra*, 92 Cal.App.4th 269 at page 302, footnote 19, criticizes two earlier decisions which affirmed the imputation of earning capacity to supported spouses because those decisions did not explain why the orders affirmed were in the best interests of the children. (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1334; *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1384-1385.)

As father admits, mother did not withdraw from the work force to become a stay-at-home parent: she enrolled as a full-time college student to acquire the training and credentials for a new career in which she can reasonably expect to earn substantially more than the minimum wage. As father fails to mention, mother also testified that she will be fully employable in her new field in the near future, at the end of the fall semester, and intends to seek full-time employment in that field.[12] Father did not put on any contrary evidence or show that mother's testimony was not credible. Therefore, the trial court could reasonably have relied on it. In light of this evidence, the court could reasonably have determined that it would serve the children's best interest to permit mother to carry out her program so as to become employable at an income well above minimum wage, and in the meantime not to impute a higher income to her based on mere speculation about what sort of full-time job she might be qualified to do now.[13]

Father purports to rely on both *In re Marriage of Cheriton* and *In re Marriage of LaBass & Munsee*, but overlooks the later decision's criticism of the earlier one.

[12] Father cites mother's testimony that she is willing to work a 40-hour week, but fails to mention that she said this in the context of prospective future employment as a teacher.

[13] Father cites to a résumé prepared by or for mother at some unknown time before she began her recent string of part-time jobs, which shows that she has worked as a bookkeeper among other things. He also cites to want ads for bookkeepers apparently taken from a local newspaper dated April 4, 2002. However, father does not show that mother worked full-time as a bookkeeper at any time later than 1995 or that her skill level

Moreover, the court stated it could impute a higher income to mother "in six months or eight months, . . . if she's earning more." Thus, the court impliedly invited father to seek modification of its present order in the future if he could show then that mother was earning more than the minimum wage. Contrary to father's assertion, the court did not "allow[] one parent to lower [her] income at will": it made clear that if presented with real evidence mother had raised her income, it would modify its support order accordingly.

Father asserts that the court failed to comply with section 4005, which provides: "At the request of either party, the court shall make appropriate findings with respect to the circumstances on which the order for support of a child is based." He claims the court did not make such findings as to mother's income because it merely stated: "[Mother] has a minimum wage earning capacity at this point in time." However, section 4005 on its face does not require the court to make findings any more specific than that, and father does not cite any authority so construing the statute. The court's findings as to both parents' incomes, and father's attempt to conceal a significant part of his, sufficiently explain the support order made here.

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would make her currently employable in a full-time position in that field. Nor does he show that any of this evidence, which he cites from his motion to reconsider Judge McNelis's order, was before Judge McNelis when he made that order, or why he could not have introduced such evidence at that time.

Father has not shown that the court abused its discretion by imputing minimum wage income to mother until she obtains the skills and qualifications to earn more.

III

Father contends, under the heading "Did the Court Differ from the Statewide Guideline," that the court's order erred as to timeshare percentages and deductions for health insurance. We reject this contention.

First, it is raised improperly. Every argument in an appellate brief must appear under a heading or subheading which summarizes the point, and any argument not so presented is waived. (Cal. Rules of Court, rule 14(a)(1)(B); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) The heading of father's argument does not give any indication of the points made under it. Therefore those points are waived.

But even if father's arguments were properly raised, we would reject them. Exhibit A, attached to the trial court's order, shows a DissoMaster calculation in support of the order, which includes the findings that father's timeshare percentage is 27 percent and health insurance deductions are $155 per month. Father merely asserts the court should have accepted his evidence on these points and rejected any contrary evidence. Such a premise is not cognizable on appeal, where father has the burden of showing that the court prejudicially abused its discretion by making the findings it did. (Cal. Const., art.

VI, § 13; *In re Marriage of Butler & Gill, supra*, 53 Cal.App.4th 462, 465.)

DISPOSITION

The order dated April 17, 2002, is affirmed. Father's appeal from the order dated June 4, 2002, is dismissed. Mother shall receive her costs on appeal.

SIMS, J.

We concur:

SCOTLAND, P.J.

ROBIE, J.